UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 23-20519-CIV-MARTINEZ

LEROY M. LINCOLN,

Plaintiff,

v.

NCL (BAHAMAS) LTD. d/b/a
NORWEGIAN CRUISE LINE,

Defendant.

_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before this Court on Defendant's Motion to Dismiss the Complaint ("Motion"), (ECF No. 13). Plaintiff filed a Response, (ECF No. 16), to which Defendant replied, (ECF No. 17). This Court has reviewed the Motion, pertinent portions of the record, and applicable law and is otherwise fully advised of the premises. Accordingly, after careful consideration, the Motion is **GRANTED** for the reasons set forth herein.

I. BACKGROUND

By this action, Plaintiff Leroy M. Lincoln seeks to recover against Defendant NCL (Bahamas), Ltd. d/b/a Norwegian Cruise Line for alleged negligence in connection with an incident where Plaintiff fell off an overwater swing onto rocks below and sustained injuries. (*See generally* Compl., ECF No. 1.)

Prior to the start of the cruise, Plaintiff and NCL entered into the Norwegian Cruise Line Guest Ticket Contract. ("Contract").[1] (*Id.* ¶ 9.) On the first page of the Contract, there is a box labeled "**IMPORTANT NOTICE**" which states:

> GUESTS ARE ADVISED TO CAREFULLY READ AND REVIEW THE TERMS AND CONDITIONS OF THE GUEST TICKET CONTRACT SET FORTH BELOW WHICH AFFECT YOUR LEGAL RIGHTS AND ARE BINDING. THE GUEST'S ATTENTION IS SPECIFICALLY DIRECTED TO SECTION 6 (LIMITATIONS AND DISCLAIMERS OF LIABILITY), SECTION 8 (LIABILITY LIMITATION FOR BAGGAGE AND VALUABLES), SECTION 11 (TIME LIMITATIONS FOR ACTIONS, MANDATORY ARBITRATION FOR CERTAIN CLAIMS AND WAIVER OF CLASS ACTIONS) AND SECTION 15 (VENUE AND GOVERNING LAW).
>
> GUESTS ARE ALSO ADVISED TO CAREFULLY READ AND REVIEW SECTION 4 AND CARRIER'S WEBSITE AT HTTPS://WWW.NCL.COM/SAFE WHICH CONTAIN IMPORTANT TERMS, CONDITIONS, POLICIES, PROCEDURES AND REQUIREMENTS RELATED TO PUBLIC HEALTH AND COVID-19.
>
> ACCEPTANCE OR USE OF THIS CONTRACT SHALL CONSTITUTE THE AGREEMENT OF GUEST TO THESE TERMS AND CONDITIONS.

(*Id.*, Ex. A at 1, ECF No. 1-1.) The notice specifically directed Plaintiff to Sections 11 and 15 of the Contract.

Section 11 of the Contract is entitled "**Time Limitations of Actions; Arbitration; Waiver of Class Action Right**." (*Id.*, Ex. A § 11.) Section 11(a) of the Contract, entitled "**SUITS FOR INJURY OR DEATH**" states:

> THE GUEST AGREES THAT NO SUIT, WHETHER BROUGHT IN REM OR IN PERSONAM, SHALL BE MAINTAINED AGAINST THE CARRIER FOR EMOTIONAL OR PHYSICAL INJURY, ILLNESS OR DEATH OF GUEST UNLESS WRITTEN NOTICE OF THE CLAIM, INCLUDING A COMPLETE

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[1] Defendant asserts that Plaintiff attached a copy of the December 2022 version of the Contract to the Complaint, however, the April 2021 version is the Contract version which Plaintiff accepted and sailed under. (Mot. ¶ 3, ECF No. 13.) Plaintiff alleges he was never furnished with a copy of the April 2021 version nor did he have access to the April 2021 version. (Resp. ¶ 10, ECF No. 16.) However, the terms, conditions, and language relevant to the instant matter are the same, and therefore both versions will be considered the same for purposes of this Order.

> FACTUAL ACCOUNT OF THE BASIS OF SUCH CLAIM, IS DELIVERED TO THE CARRIER WITHIN 185 CALENDAR DAYS FROM THE DATE OF THE INCIDENT GIVING RISE TO SUCH INJURY, ILLNESS OR DEATH; AND NO SUIT SHALL BE MAINTAINABLE UNLESS COMMENCED WITHIN ONE (1) YEAR FROM THE DAY OF THE INCIDENT GIVING RISE TO SUCH INJURY, ILLNESS OR DEATH, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

(*Id.*, Ex. A at § 11(a).)

Section 15 of the Contract is entitled "**VENUE AND GOVERNING LAW**." Section 15 states:

> EXCEPT AS OTHERWISE SPECIFIED HEREIN, ANY AND ALL DISPUTES WHATSOEVER ARISING OUT OF OR RELATING TO THIS CONTRACT OR THE GUEST'S CRUISE, AS WELL AS THE INTERPRETATION, APPLICABILITY, AND ENFORCEMENT OF THIS CONTRACT SHALL BE GOVERNED EXCLUSIVELY BY THE GENERAL MARITIME LAW OF THE UNITED STATES, WHICH SHALL INCLUDE THE DEATH ON THE HIGH SEAS ACT (46 USCS § 30302) WITHOUT REGARD TO CHOICE OF LAW RULES, WHICH REPLACES, SUPERSEDES AND PREEMPTS ANY PROVISION OF LAW OF ANY STATE OR NATION TO THE CONTRARY. IT IS HEREBY AGREED THAT ANY AND ALL CLAIMS, DISPUTES OR CONTROVERSIES WHATSOEVER ARISING FROM, RELATED TO, OR IN CONNECTION WITH THIS CONTRACT OR THE GUEST'S VOYAGE, INCLUDING ANY ACTIVITIES ON OR OFF THE VESSEL OR TRANSPORTATION FURNISHED THEREWITH, WITH THE SOLE EXCEPTION OF CLAIMS SUBJECT TO BINDING ARBITRATION UNDER SECTION 11(B) ABOVE, SHALL BE COMMENCED, FILED AND LITIGATED, IF AT ALL, BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN MIAMI, FLORIDA, U.S.A., OR AS TO THOSE LAWSUITS FOR WHICH THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLOIRDA LACKS SUBJECT MATTER JURISDICTION BEFORE A COURT OF COMPETENT JURISDICTION IN MIAMI-DADE COUNTY, FLORIDA, U.S.A., TO THE EXCLUSION OF THE COURTS OF ANY OTHER COUNTRY, STATE, CITY OR COUNTY WHERE SUIT MIGHT OTHERWISE BE BROUGHT.

(*Id.*, Ex. A § 15.)

On July 9, 2022, Plaintiff was a passenger on Defendant's vessel, the Norwegian Encore ("Encore") and on July 15, 2022, the Encore was called on Great Stirrup Cay, Bahamas, an island owned, operated and/or maintained by Defendant. (*Id.* ¶ 12, 17–18.) While ashore on Great Stirrup

Cay, Plaintiff utilized the overwater swing feature located in the waterside area of the Main Beach where Plaintiff alleges he slid off of the swing's "slippery surface" and fell into the "submerged rock projection directly beneath the [overwater swing feature]." (*Id.* ¶ 20–21.) Plaintiff alleges he sustained severe injuries to his head, face, and body. (*Id.* ¶ 21.) On or about February 14, 2022, Plaintiff alleges he provided notice to Defendant of the incident pursuant to Section 11(a) of the Contract. (*Id.* ¶ 29.)

Defendant asserts that its Claims Department received a letter of representation from Plaintiff's counsel dated January 31, 2022, advising Defendant that Plaintiff was injured on January 15, 2022. (Mot. ¶ 8.) Defendant further asserts that Defendant's Claims Representative responded to Plaintiff's January 31, 2022, letter on February 8, 2022, reserving all rights contained within the Contract, including the forum selection provision. (*Id.* ¶ 9.) Defendant attached both Plaintiff's January 31, 2022, letter and Defendant's February 8, 2022, response letter to the Motion. Plaintiff, however, alleges that he has no record of receiving a response or acknowledgement from Defendant following his pre-suit notice and further argues that because he did not receive a response from Defendant, he proceeded to file suit in state court to preserve his claims. (Resp. ¶ 7–10.)

The relevant dates are as follows. Plaintiff filed his state court action on January 10, 2023, five (5) days prior to the expiration of the contractual limitation period. *See Leroy M. Lincoln v. NCL (Bahamas) Ltd. d/b/a Norwegian Cruise Line*, Miami-Dade County Case No. 2023-000427-CA-01, DIN 1. On February 9, 2023, Plaintiff then filed the instant action while the state court action was pending. (*See generally* Compl.) On the same day, Defendant filed a Motion to Dismiss in the state court action on the basis that the venue was improper. *See Leroy M. Lincoln v. NCL (Bahamas) Ltd. d/b/a Norwegian Cruise Line*, Miami-Dade County Case No. 2023-000427-CA-

01, DIN 12. On April 18, 2023, Defendant filed its Notice of Appearance in the instant action. (*See generally* Def.'s Notice of Appearance, ECF No. 8.) On June 19, 2023, Defendant filed the instant Motion. (*See generally* Mot.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss for failure to state a claim, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action. . . ." *Twombly*, 550 U.S. at 555.

When ruling on a Rule 12(b)(6) motion, a court must "accept the factual allegations in the complaint as true, construing them in the light most favorable to the plaintiff . . . ." *Quality Auto Painting Ctr. Of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1260 (11th Cir. 2019) (first citing *Twombly*, 550 U.S. at 570; and then citing *Iqbal*, 556 U.S. at 678). Courts are nevertheless "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citing *Brisco v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555–56 (cleaned up).

III. DISCUSSION

The Complaint asserts this Court has subject matter jurisdiction under 28 U.S.C. § 1332, diversity jurisdiction and 28 U.S.C. § 1333, admiralty jurisdiction. Federal courts enjoy original,

exclusive jurisdiction under § 1333, which extends to, "Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333. In order for a tort claim to fall within the exclusive jurisdiction of the federal courts under § 1333, two requirements must be satisfied: "(1) the incident must have taken place on navigable water or the injury must have been caused by a vessel on navigable water; and (2) the incident must have been "connected with maritime activity." *DeRoy v. Carnival Corp.*, 963 F.3d 1302, 1311–12 (11th Cir. 2020) (quoting *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018)). The Eleventh Circuit has consistently held that "when cruise-ship passengers bring personal-injury claims for injuries that occurred at sea, those claims fall squarely within the admiralty jurisdiction of the district courts." *Id.* (citing *Caron*, 910 F.3d at 1365). However, Plaintiff has not asserted a negligence claim against Defendant for an injury "that occurred *at sea*." *Id.* (emphasis added). Because Plaintiff's injury did not occur at sea, the federal courts do not enjoy exclusive jurisdiction over the claim and the state court was a court of competent jurisdiction that enjoyed concurrent subject matter jurisdiction over the negligence claim. *Booth v. Carnival Corp.*, 522 F.3d 1148, 1150, 1152 (11th Cir. 2008).

A. Plaintiff's Claim was Equitably Tolled

First, Defendant argues that this action is time-barred because Plaintiff failed to file his claim in this Court within one-year of his alleged injury, as required by the Contract. (*See generally* Mot.) In response, Plaintiff argues that equitable tolling applies because he timely filed his claim in state court prior to the expiration of the contractual limitation period.[2] (*See* Resp. 17–22).

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[2] Alternatively, Plaintiff argues in his Response that his state court filing was proper because the "Land Packages" section of the Contract should apply. (Resp. ¶ 12.) Section 8 of the "Land Packages" Terms and Conditions states, in pertinent part, "ALL CLAIMS, DISPUTES OR CONTROVERSIES WHATSOEVER ARISING FROM, RELATED TO, OR IN CONNECTION WITH THIS VOUCHER OR GROUND PACKAGE PROGRAM ASSOCIATED THEREWITH

When determining whether contractual limitations within a guest ticket contract are valid and enforceable, a court must look at whether "the cruise ticket provided the passenger with reasonably adequate notice that the limit existed and formed part of the passenger contract." *Cruz v. Carnival Corp.*, No. 06-20929-CIV, 2006 WL 8433547, at *2 (S.D. Fla. July 26, 2006) (citing *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1566–67 (11th Cir. 1990)). To provide reasonably adequate notice, the language of a guest ticket contract must "reasonably communicate to passengers the existence within the ticket of important terms and conditions which affect legal rights." *Id.* at 1567 (alterations adopted) (quoting *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 867 (1st Cir. 1983)). Reasonable communication is measured in a two-part test, taking into account: (1) "the clause's physical characteristics;" and (2) "whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms." *Krenkel v. Kerzner Intern. Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). "Forum-selection clauses are presumptively valid and enforceable unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances." *Id.*

The notice at issue on the front page of the Contract, which directs passengers to certain provisions of the contract affecting the passenger's legal rights is sufficient to establish adequate notice and reasonable communication of contract limitations. *See Cruz*, 2006 WL 8433547 at *3.

. . . SHALL BE COMMENCED, FILED AND LITIGATED, IF AT ALL, BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN MIAMI, FLORIDA, U.S.A., OR AS TO THOSE LAWSUITS FOR WHICH THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA LACKS SUBJECT MATTER JURISDICTION BEFORE A COURT OF COMPETENT JURISDICTION IN MIAMI-DADE COUNTY, FLORIDA, U.S.A." (Compl., Ex. A.) This Court disagrees that Plaintiff's injuries fall within the scope of the "Land Packages" section because Plaintiff failed to allege in the Complaint any fact establishing that Plaintiff's injury was a result of a land package that Plaintiff purchased through Defendant. Nevertheless, this Court accepts Plaintiff's equitable tolling argument.

In *Cruz*, the cover page of the guest ticket contract contained a section entitled "**IMPORTANT NOTICE TO GUESTS**" which directed guests to review the conditions contained in the guest ticket contract, some of which pertained to limitations of rights to assert claims. *Id.* at *2. Furthermore, the guest ticket contract contained two clauses outlining the passenger's right to file suit against the defendant and the time limitations regarding suit as well as the required forum in which an action should be filed. *Id.* The court concluded that the language of the guest ticket contract provided adequate notice and reasonably communicated the contract limitations because the ticket contract outlined the passenger's rights and limitations to those rights in various locations of the ticket contract. *Id.* at *3; *see also Nash*, 901 F.2d at 1567–68 (finding a notice in bold, red type directing the passenger to certain pages, one of which contained a time limitation regarding filing suit, was sufficient to provide the passenger with adequate notice).

Here, the Contract provided Plaintiff with adequate notice and reasonably communicated the limitations contained within the Contract, because, like the guest ticket contracts in *Cruz* and *Nash*, the Contract contained a box on the top of the first page entitled "**IMPORTANT NOTICE**" which specifically directed Plaintiff to Sections 11 and 15 of the Contract. Section 11(a) of the Contract entitled "**Time Limitations of Actions; Arbitration; Waiver of Class Action Right: SUITS FOR INJURY OR DEATH**" outlined Plaintiff's right to bring a personal injury action against Defendant within the one-year limitation period. (Compl. Ex. A § 11(a).) Section 15 of the Contract entitled "**VENUE AND GOVERNING LAW**" set forth the requirement to file suit in the United States District Court for the Southern District of Florida in Miami, Florida. (Compl. Ex. A § 15.) Additionally, both Section 11(a) and Section 15 of the Contract were in bold font and capitalized, setting these sections apart from the surrounding text.

Given that the one-year limitation and forum-selection provisions of the Contract are valid and enforceable against Plaintiff, this Court must next consider whether equitable tolling is appropriate. *See Cruz*, 2006 WL 8433547 at *3. "[T]olling is an extraordinary remedy which should be extended only sparingly." *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (citing *Irwin v. Dep't. of Veterans Affs.*, 489 U.S. 89, 96 (1990)). Equitable tolling is appropriate when: (1) a defendant misleads a plaintiff into allowing the statutory period to lapse; (2) a plaintiff has no reasonable method of discovering the injury; or (3) a plaintiff files a technically defective pleading but acts with the proper diligence ensured by statute of limitations. *Id.* Generally, equitable tolling is warranted when an inequitable event prevents a plaintiff from timely filing the action. *Booth v. Carnival Corp.*, 522 F.3d 1148, 1150 (11th Cir. 2008). Alternatively, the "interests of justice side with the defendant when the plaintiff does not file [his] action in a timely fashion despite knowing or being in a position reasonably to know that the limitations period is running." *Id.* "The burden is on the plaintiff to show that equitable tolling is warranted." *Id.* (citing *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir.1993)).

In *Booth*, the estate of a deceased cruise ship passenger timely provided Carnival with written notice of the wrongful death claim and formally filed the action in state court against Carnival sixteen (16) days before the contractual limitation period in the passenger-ticket contract expired. *Id.* 522 F.3d at 1149. While the state court action was pending, but after the contractual limitation period had expired, the plaintiff filed a second, identical action in federal court, which was administratively closed pending the outcome in state court. *Id.* at 1150. In state court, Carnival moved to dismiss on the basis that the passenger ticket contained a federal forum clause. *Id.* The state court action was eventually dismissed on venue grounds in the state appellate court. *Id.* Following the dismissal, the federal action was re-opened, where Carnival once again moved to

dismiss, this time on the basis that the contractual limitation period had expired. *Id.* The federal district court denied the motion, ruling the limitation period was subject to equitable tolling. *Id.* On appeal, the Eleventh Circuit held that the plaintiff's claim was equitably tolled because the plaintiff filed suit in a court of competent jurisdiction prior to the expiration of the contractual limitation period. *Id.* at 1152. The court noted that while it is well-established that "filing in a court *without competent jurisdiction* does not toll the statute of limitation," plaintiff did no such thing because the state court had concurrent subject matter jurisdiction. *Id.* at 1153; *see also Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1353 (11th Cir. 2000). The Eleventh Circuit reasoned that the plaintiff did not sleep on his rights because he provided the defendant with timely pre-suit notice, thereby notifying the defendant within the limitation period that plaintiff was actively pursuing the claim. *Booth*, 522 F.3d at 1152. The court stated, "[t]he underlying policy of repose, reflected in the agreed-upon limitation period, and designed to assure fairness to [the defendant], is not violated by equitable tolling in this case," but rather that the interests of justice were best served in "allowing the parties to resolve [the plaintiff's] claims on the merits." *Id.*; *see also Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434 (1965) (noting "both Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court."); *Justice*, 6 F.3d at 1479 (finding equitable tolling is appropriate where the plaintiff otherwise timely files a technically defective pleading, but in all other respects acted with the proper diligence that the limitations period was intended to ensure).

Here, equitable tolling is appropriate. The facts of this case mirror *Booth*. Plaintiff timely provided Defendant with written pre-suit notice of the incident and Defendant received the notice prior to the expiration of the contractual limitation period. (*See* Compl. ¶ 29; Mot. ¶ 8.) While

Plaintiff's state court claim was still pending, Plaintiff filed a second, identical action in federal court following Defendant's notice to Plaintiff that it intended to enforce the federal forum provision in the Contract. (*See generally* Compl.) Construing the facts in the light most favorable to Plaintiff, this Court finds that Plaintiff did not sleep on his rights when he filed his technically defective, but otherwise timely, complaint in state court on January 10, 2023, five (5) days before the contractual limitation period expired. *See Leroy M. Lincoln v. NCL (Bahamas) Ltd. d/b/a Norwegian Cruise Line*, Miami-Dade County Case No. 2023-000427-CA-01, DIN 1; *Booth*, 522 F.3d at 1152. Moreover, Defendant had notice that Plaintiff was actively pursuing his claim well before the contractual limitation period expired. (*See* Compl. ¶ 29; Mot. ¶ 8.)

Moreover, Plaintiff could have reasonably, but erroneously, believed that Defendant waived the venue defense. While Defendant asserts that it responded to Plaintiff's pre-suit notice and reserved its rights under the venue provision, Plaintiff argues that he never received Defendant's reservation of rights because it was sent to an outdated email address. (Mot. ¶ 9; Resp. ¶ 7.) *See also Booth,* 522 F.3d at 1153 (finding a plaintiff does not sleep on his claim when he reasonably, but erroneously, believed the defendant had waived the venue provision of the passenger ticket contract). Therefore, this action is equitably tolled.

B. Plaintiff Failed to Sufficiently Plead Notice

To establish a claim for negligence in the maritime context, a plaintiff must allege: "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Holland v. Carnival Corp.*, 50 F.4th 1088, 1094 (11th Cir. 2022) (quoting *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1253 (11th Cir. 2014)). As to the duty element, a shipowner must have actual or constructive notice of the hazardous condition. *Id.*

Plaintiff may establish actual notice by pleading that Defendant directly knew about a dangerous or hazardous condition, or alternatively, he may establish constructive notice by alleging: (1) "the 'defective condition existed for a sufficient period of time to invite corrective measures;'" or (2) "substantially similar incidents in which 'conditions substantially similar to the occurrence in question must have caused the prior accident.'" *Id.* (citing *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019)). Conclusory allegations are insufficient. *See Holland*, 50 F.4th at 1091–92, 1095–96 (affirming dismissal for failure to plead constructive notice where plaintiff alleged the glass staircase was "one of the most highly trafficked areas of the ship," that crewmembers had an unobstructed view of the staircase, that Carnival was aware of frequent spills and slip and fall incidents on the staircase, that Carnival knew or should have known of the presence of the substance because crewmembers were staffed at the stores surrounding the staircase for four hours prior to plaintiff's fall, and that a violation of safety hazards served as constructive notice.)

Here, Plaintiff does not plead actual notice, but rather relies only on constructive notice. Plaintiff alleges that Defendant had a duty to Plaintiff, (Compl. ¶ 33), Defendant breached that duty, (*id.* ¶ 35), Plaintiff was harmed as a direct and proximate result of the breach, (Compl. 36–37), and that the "hazardous conditions were known, or should have been known, to Defendants in the exercise of reasonable care," (*Id.* ¶ 24). These allegations are far too conclusory to survive dismissal. Plaintiff failed to allege sufficient facts to plausibly establish that Defendant knew, or had reason to know, that the allegedly dangerous conditions were present. *See Holland*, 50 F.4th at 1094 (citing *Guevara*, 920 F.3d at 720). Therefore, dismissal is warranted.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Motion, (ECF No. 13), is **GRANTED IN PART** as set forth herein.
2. The Complaint is **DISMISSED without prejudice and with leave to amend**.
3. Plaintiff is **DIRECTED** to file an amended complaint within **FIFTEEN (15)** days of the date of this order.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of January, 2024.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All Counsel of Record